Petition

Office - Supreme Court, U.S.
FILED
MAR 9 1982
ALEXANDER L. STEVAS,
CLERK

81-1663

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHNNY KIBLER,
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRUCE C. BEREANO
195 Duke of Gloucester Street
Annapolis, Maryland 21401
(301)267-0410

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Was the defendant, convicted in the United States District Court for the District of Maryland of endeavoring to influence, intimidate and impede a witness before that court in violation of 18 U.S.C. §§ 1503 and 2, deprived of his Constitutional right to be tried in the State and district wherein his alleged crime was committed, where all of defendant's alleged acts of endeavoring to influence, intimidate and impede the witness occurred outside the District of Maryland?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES.	iv
OPINIONS BELOW.	2
JURISDICTION.	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.	4
STATEMENT OF THE CASE	7
REASONS FOR ALLOWING THE WRIT	15
CONCLUSION.	31

APPENDIX:

A. Opinion Sought to Be Reviewed, United States v. Kibler, No. N-79-5337, _____F.2d_____, (4th Cir. Jan. 8, 1982).	A-1
B. The District Court's oral opinion, dated September 24, 1979, ruling on defendant's motion to dismiss the indictment for want of proper venue. .	A-18
C. The District Court's Order of September 24, 1979, denying defendant's motion to dismiss the indictment	A-23
D. Notice of Judgment of the United States Court of Appeals for the Fourth Circuit, entered January 8, 1982.	A-25

Page

E. Indictment filed June 19, 1979. . . . . A-26

F. Defendant's Motion to Dismiss the Indictment, filed September 19, 1979. . . . . A-28

G. Government's Opposition to Defendant's Motion to Dismiss Indictment filed September 20, 1979. . . . . A-34

H. The District Court's instructions to the jury, September 25, 1979, relevant to venue issue . A-39

Certificate of Service. A-44

TABLE OF AUTHORITIES

Cases

Page

United States v. Bachert, 449 F.Supp. 508 (E.D.Pa. 1978).... 18

United States v. Brothman, 191 F.2d 70 (2d Cir. 1951)..... 18

United States v. Grande, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830, 449 U.S. 919 (1980)..... 19

Nye v. United States, 313 U.S. 33 (1941).....27,28,29

United States v. Barham, 666 F.2d 521 (11th Cir. 1982)..... 29

United States v. Johnson, 323 U.S. 273 (1944)..... 16

United States v. Nadolny, 601 F.2d 940 (7th Cir. 1979).....19,20,21

United States v. O'Donnell, 510 F.2d 1190 (6th Cir.), cert. denied, 421 U.S. 1001 (1975)..... 22,29

United States v. Swann, 142 U.S. App. D.C. 363, 441 F.2d 1053 (1971).....18,19,20,23

United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 3112, 69 L.Ed. 2d 974 (1981)..... 22,29

Constitutional Provisions

Page

Constitution of the United States

Article III, Section 2, Clause 3..... 16

Sixth Amendment..... 16

Statutes and Rules

Judiciary Act of 1789, §17, 1 Stat. 83..... 25

Act of March 2, 1831, 4 Stat. 487
Section 1..... 26,28
Section 2.....24,26-27

18 U.S.C. § 2..... 8
§ 401..... 26
§ 1503..... 7,8,15 17,21,22 24,27,29 30
§ 1510..... 19

Federal Rules of Criminal Procedure, Rule 18..... 16

Others

7 Cong. Deb., 21st Cong., 2nd Sess., Feb. 1, 1831 (Gales & Seatons Reg.) cols. 560-561..... 26

Frankfurter and Landis, Power of Congress Over Procedure in Criminal Attempts in "Inferior" Federal Courts -- A Study in Separation of Powers, 37 Harv. L. Rev. 1010 (1924)..... 27

Page

Nelles and King, Contempt By Publication in the United States, 28 Colum. L. Rev. 401,525 (1928)..... 27

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

JOHNNY KIBLER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Johnny Kibler, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this cause on January 8, 1982.

OPINIONS BELOW

The January 8, 1982 opinion of the United States Court of Appeals for the Fourth Circuit, whose judgment is herein sought to be reviewed, is not yet published in the Federal Reporter 2d and is reprinted in Appendix A to this Petition.

The prior opinion and order of the United States District Court for the District of Maryland, Criminal No. N-79-0280, denying defendant's motion to dismiss the indictment for lack of proper venue, are unpublished and are reprinted in Appendices B and C to this Petition.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were made and entered on January 8, 1982, and copies thereof are appended to this Petition in Appendices A and D respectively.

This Court has jurisdiction to review the judgment rendered below pursuant to the provisions of Title 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutional and statutory provisions cited below.

United States Constitution, Article 3, Section 2, Clause 3

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Constitution, Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence.

18 U.S.C. § 1503. Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. §2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Johnny Kibler (hereinafter referred to as the "defendant") was arrested on June 15, 1979, in Washington, the District of Columbia, by special agents of the Federal Bureau of Investigation pursuant to a warrant of arrest issued June 14. 1979, by the United States District Court for the District of Maryland charging defendant with obstruction of justice in violation of 18 U.S.C. § 1503. On June 19, 1979, an indictment was filed by the grand jury for the District of Maryland charging that on or about May 24, 1979, defendant ". . . in the State and District of Maryland. . . did by threat and force endeavor to influence, intimidate and impede a witness, Albert W. Morgan, in the cases of United States v.

Kenneth R. Preston, et al and United States v. Kenneth R. Preston, et al, then pending in the United States District Court for the District of Maryland, Criminal Nos. N-79-0121 and N-79-0211, respectively, in the discharge of his duty as such witness by attempting to cause the said Albert W. Morgan to testify falsely and by attempting to prevent the said Albert W. Morgan from testifying", in violation of 18 U.S.C. §§ 1503 and 2. (Appendix, p. A-26)

The defendant prior to trial filed a Motion to Dismiss the Indictment for want of proper venue. Defendant contended that all of the alleged acts for which he was indicted occurred in the District of Columbia and not in the State of Maryland. He therefore moved the court to dismiss the indictment or to transfer the same to the United States District Court for the District of Columbia. (Appendix,

p. A-28) The government's Opposition to defendant's Motion to Dismiss the Indictment argued that, even though all of defendant's acts took place in the District of Columbia, venue lay in the District of Maryland because the court proceeding in which the witness Albert W. Morgan was to testify was in the District of Maryland. (Appendix, p. A-34)

Prior to commencement of trial on September 24, 1979, the court denied defendant's Motion to Dismiss the Indictment. The court ruled that because defendant was alleged to have endeavored to obstruct the administration of justice in the District of Maryland, proper venue lay in that district for trial, even though the defendant never entered the State of Maryland. (Appendix, pp. A-18, A-23)

The facts adduced at trial were that on the evening of May 24, 1979, the defendant and Kenneth Preston approached

the witness, Albert Morgan, in front of Morgan's home in the District of Columbia. Their purpose in seeing Morgan that night was to find out what information Morgan had given authorities regarding a Baltimore bank robbery involving Morgan, Preston and Isaac Pendergast, who was Kibler's friend. Morgan had testified about the robbery before the grand jury and was to appear as a government witness at trial in the case (Criminal No. N-79-0211) and in another bank robbery case involving Preston and Kibler's friend, Pendergast (Criminal No. N-79-0211). Both cases were pending in the United States District Court for the District of Maryland.

When Preston and Kibler located Morgan's house on the evening of May 24th, Preston remained in the car, and Kibler went to the front of the house where he talked with Morgan. According to Morgan's

testimony, Kibler asked Morgan whether he was "snitching" and told Morgan that "snitches get hurt, even in jail." Morgan consistently denied to Kibler that he was "snitching."

Preston then appeared, and Morgan and Kibler walked over to talk to him. Morgan denied to Preston that he was snitching. Preston said he was, and asked Morgan to come with him.

Morgan rode with Preston in Preston's car to various locations in Washington and Maryland over the next four hours or so trying to find a notary so Morgan could write out a statement that Morgan did not know Preston or Pendergast and that Morgan had been forced by the FBI to say things against them. As recalled by Morgan, the first time any mention was made of his signing an affidavit was when Preston told him to write a statement while they were riding in

Preston's car. Preston testified that he asked Morgan to sign the affidavit while they were talking with Kibler in front of Morgan's house. Kibler did not accompany Preston and Morgan after they left Morgan's house and did not follow them into Maryland. After spending several hours searching without success for a notary, Preston brought Morgan back home.

At the conclusion of the trial, the court began its instructions to the jury by directing that as a matter of law the fact that the defendant never came into Maryland was not material. The court subsequently reiterated this instruction.

The court stated, ". . . the law is as far as this Court's concerned that Kibler need not be in Maryland to have caused an obstruction of justice. Only the fact that the cases were pending in Maryland which the Government alleges

caused obstruction so that's a point of law that you need not to bother about. I mean that's something that the fact that he didn't come into Maryland is not material in reference to what occurred in this matter." (Appendix, p. A-40)

After reading the Indictment to the jury, the court instructed, "Furthermore, I told you that it's not necessary that Morgan [sic] present himself in the State of Maryland in reference to this count of obstructing justice. He may do so from a distance. All that's necessary is that the case is pending in this district which is stated in the stipulation, that there were two cases pending, which the Government intended to call him as a witness, at least in one of them." (Appendix, p. A-42)

The trial jury returned a verdict of guilty, and on November 26, 1979, the defendant was adjudged convicted as

charged and sentenced to a term of imprisonment of one year. Defendant appealed the judgment to the United States Court of Appeals for the Fourth Circuit, which on January 8, 1982, affirmed the judgment of the trial court. (Fourth Circuit Opinion, Appendix, p. A-1)

REASONS FOR ALLOWING THE WRIT

This petition for writ of certiorari should be granted so that the diverse holdings of the federal courts of appeal on the question of proper venue for prosecution of an offense of endeavoring to influence a witness under 18 U.S.C. § 1503 may be addressed and the law on this issue uniformly determined. Seven federal courts of appeal have reviewed the question presented by this petition, with no uniform result.

As more fully discussed below, three circuits hold that venue lies in the district wherein the physical act of endeavoring to influence the witness took place. Four circuits, including the Fourth Circuit hereinbelow, hold that venue in such cases lies in the district of the court proceeding in which the witness was to testify.

The United States Constitution

requires that a defendant in a criminal proceeding be tried in the State and district where his crime was committed. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI. This requirement is further embodied in Rule 18 of the Federal Rules of Criminal Procedure.[1/] As this Court has stated,

> Questions of venue in criminal cases ... are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. United States v. Johnson, 323 U.S. 273 (1944).

When federal courts of appeal reach opposite conclusions regarding such an important Constitutional issue, it is appropriate for and incumbent upon this Court to hear and decide the issue.

The defendant in this case was charged with endeavoring "in the State and District of Maryland" by threat and

---

1/ Rule 18 states, "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed ...."

force to influence, intimidate and impede a witness in a judicial proceeding then pending in the District of Maryland. The evidence in this case is uncontroverted that all of defendant's alleged acts in connection with such endeavor occurred in the District of Columbia. Defendant never came into the State of Maryland. Defendant has a Constitutional right to be tried in the State and district where his crime was committed. Where then did defendant's "crime" of violating 18 U.S.C. § 1503 occur?

Defendant contends that the gravamen of his alleged offense is his action in the District of Columbia in allegedly attempting to cause Albert Morgan not to testify or to testify falsely. The "mold and form" of the defendant's alleged crime was "finally cast" in the District of Columbia. It could not be altered by anything that might have subsequently

happened in the State and District of Maryland or in the Maryland District Court proceeding. United States v. Swann, 142 U.S.App. D.C. 363, 441 F.2d 1053, 1055 (1971); accord, United States v. Bachert, 449 F.Supp. 508 (E.D.Pa. 1978); United States v. Brothman, 191 F.2d 70 (2d Cir. 1951).

In the case of United States v. Swann, the defendant was charged in the District of Columbia for endeavoring to obstruct justice by assaulting a complaining witness while in the State of Maryland to prevent her from testifying at trial in the District of Columbia. The court held that the fact that the defendant hoped to affect the witness's testimony in the District of Columbia did not establish venue there. "The offense condemned by the statute and charged in the indictment was begun, carried out and completed in the State

of Maryland . . . ." and accordingly venue lay in the State of Maryland. 441 F.2d at 1055.

The reasoning of the District of Columbia Circuit Court in Swann was adopted by the United States Court of Appeals for the Seventh Circuit in United States v. Nadolny, 601 F.2d 940 (7th Cir. 1979). In Nadolny, the court was required to determine the venue for an offense of obstructing a criminal investigation in violation of 18 U.S.C. § 1510. 2/ Nadolny was charged with assaulting a witness who was providing information to the FBI in connection with an investigation. The assault took place

---

2/ Section 1510 was enacted in 1967 to extend the protection previously granted to witnesses and jurors in judicial proceedings to informants and potential witnesses who participate in a criminal investigation before an indictment or criminal information is filed. United States v. Grande, 620 F.2d 1026, 1036 (4th Cir.), cert. denied, 449 U.S. 830, 919 (1980).

in the Southern District of Illinois. Nadolny was charged and tried in the Eastern District of Illinois, where the investigation was being conducted.

Adopting the Swann reasoning, the Seventh Circuit held that Nadolny must be tried in the Southern District, where the gravamen of the offense -- i.e., the assault on the witness -- took place. In support of its decision, the court stated,

> The words of Rule 18 and the Sixth Amendment, taken on their face, ... indicate clearly that an accused cannot be tried in one district for an offense committed in another. Moreover, the Government's argument [that venue lay where the investigation was being conducted] strays too far from the original basis of our venue laws. Venue traditionally has been based on notions of fair, fast and efficient administration of trials. When venue is laid in the proper district -- the one in which the crime was committed -- witnesses are more readily available, and the operative facts and situs of the incident are closer at hand. The accused gets the trial by local jury envisioned by the framers of the Sixth Amendment. 601 F.2d at 943.

The defendant in the instant case submits that the same venue considerations applied

by the Seventh Circuit in Nadolny are applicable to a determination of venue under 18 U.S.C. § 1503. The logic and rationale of placing venue where defendant's actual acts of endeavoring to obstruct justice took place overwhelmingly outweigh any forced construction of the obstruction statute to place venue in the district of the judicial proceeding wherein defendant's endeavors may or may not ultimately have effect.

The Fourth Circuit panel, by a two to one decision, refused to adopt the defendant's argument and instead held that,

> [a]lthough a logical argument can be presented to place the situs of the crime only in the district where the accused threatened a witness, both the text of the statute and its legislative history persuade us that venue is proper in the district where the obstruction of justice would take effect. (Appendix, p. A-6)

While noting that "the question is not free from difficulty", the court

relied upon the reasoning and conclusions reached by the First and Sixth Circuits in the cases of United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 3112, 69 L.Ed. 2d 974 (1981); and United States v. O'Donnell, 510 F.2d 1190 (6th Cir.), cert. denied, 421 U.S. 1001 (1975).

The court in analyzing the text of § 1503 followed the example of Tedesco, supra, in examining the verbs of the statute to determine the situs of the crime as "the place of the judicial proceeding that the accused sought to thwart. The threats, force, threatening letters, or communication mentioned in the statute are nouns which merely provide a description of the means employed by the accused to achieve an illegal end." (Appendix, pp.A-7,A-8)

However, the key verbs of the statute describing the offense under § 1503 with

which the defendant is charged are "endeavors to influence, intimidate or impede any witness, in any court of the United States...." All of defendant's acts in committing such crime were performed in front of the witness Morgan's home in the District of Columbia. Defendant's such endeavor to "influence, obstruct, or impede the due administration of justice" was completed at that time, regardless of what the eventual outcome of his endeavors may ultimately have been. United States v. Swann, supra, 441 F.2d at 1055. As Chief Judge Winter stated in his dissent to the Fourth Circuit opinion below, "the offense was complete when the accused endeavored to influence the witness, and this occurred in the District of Columbia. The significance of the phrase 'in any court of the United States' is simply to define the protected class of witnesses...." (Appendix, p.A-14)

Chief Judge Winter in his dissent also disagreed with the majority's finding that "the genesis of § 1503 [is] in the power of a court to punish for contempt 'regardless of where the contemptuous acts may have occurred.' O'Donnell, 510 F.2d at 1195." As Chief Judge Winter noted, a fair review of the legislative history of § 1503 reveals that the purpose of the statute as originally enacted "was to remove the courts' power to punish for constructive contempts and to require that such proceedings be conducted by the normal process of indictment, trial and conviction, including normal rules with respect to venue." (Appendix, p. A-15)

The precursor of § 1503 was Section 2 of the Act of March 2, 1831, 4 Stat. 487. The purpose of the said Act was to substantially curtail the criminal contempt authority of federal courts. Previously, the federal contempt power was defined by

Section 17 of the Judiciary Act of 1789, 1 Stat. 83, which provided that "all the said courts of the United States shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same. . . ."

Abuses of the federal contempt power culminated in the 1830-31 impeachment trial of federal district judge James H. Peck, who had used the contempt power to disbar and imprison an attorney who had published a criticism of one of Judge Peck's opinions. Judge Peck was acquitted by a Senate vote of 22 to 21 on January 31, 1831, but the next day Congress took action to assure that the acquittal was not construed as approval of Judge Peck's actions. On February 1, 1831, the House of Representatives instructed its Committee on the Judiciary "to inquire into the expediency of defining, by statute, all offences

which may be punishable as contempts of the courts of the United States." 7 Cong. Deb., 21st Cong., 2nd Sess., Feb. 1, 1831 (Gales & Seaton's Reg.) cols. 560-561. The bill passed by the House limited the federal courts' summary power to punish for contempt of court to cases involving misbehavior in the presence of the court "or so near thereto as to obstruct the administration of justice...." The Senate amended the bill to add a second section providing that it would be an indictable offense for any person to "corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness or officer, in any court of the United States, ... or endeavour to obstruct or impede, the due administration of justice therein,..." Section 1 of the 1831 Act is now codified at 18 U.S.C. § 401 and Section 2 is now

18 U.S.C. § 1503.[3/]

The reason Section 2 was added to the Act of March 2, 1831 was

> ...to provide for things not covered by Section 1. Section 1 excluded from summary punishment certain misbehaviors which Justice Johnson had said that there was inherent power to punish--corrupt overtures, out of court, to judges, jurors or witnesses. [footnote omitted] It was clearly undesirable that such misdeeds be left altogether immune from punishment in the Federal courts. There was no necessity, or even strong expediency, that they be dealt with summarily. The current fashion in legislation ... was to transfer such comparatively remote obstructions of the administration of justice, "hitherto denominated contempts," to the category of indictable misdemeanors. That, clearly, was the moving purpose of Section 2. [footnote omitted] Nelles and King, Contempt By Publication in the United States, 28 Colum. L. Rev. 401, 531 (1928).

The Supreme Court in Nye v. United States, 313 U.S. 33 (1941), reviewed the

---

3/ See the legislative history of the Act of March 2, 1831, detailed in Nelles and King, Contempt By Publication in the United States, 28 Colum. L. Rev. 401, 525-532 (1928); and Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts -- A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1023-1038 (1924).

legislative history of the 1831 Act for purposes of identifying conduct falling within the confines of Section 1 of the Act (then codified as § 268 of the Judicial Code) "so that,unless [the requirements of Section 1] are clearly satisfied, an offense will be dealt with as the law deals with the run of illegal acts." 313 U.S. at 51. The Court held that the conduct of the petitioners in the Nye case was

> ...of a kind which corrupts the judicial process and impedes the administration of justice. But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity. Sec. 135 of the Criminal Code, a descendant of § 2, of the Act of March 2, 1831, [now 18 U.S.C. § 1503] embraces a broad category of offenses. And certainly it cannot be denied that the conduct here in question comes far closer to the family of offenses there described than it does to the more limited classes of contempts described in § 268 of the Judicial Code. ...
>
> * * * *
>
> If petitioners can be punished for their misconduct, it must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions. ... 313 U.S. at 52, 53.

The normal safeguards surrounding a criminal prosecution include the defendant's Constitutional right to be tried in the State and district in which his alleged crime was committed. Neither the legislative history of § 1503 nor the Nye decision dictate that a federal court has power to punish contempts committed outside its presence, regardless of where the acts may have occurred. The Fourth Circuit below erred, defendant contends, in following the O'Donnell and Tedesco opinions to the contrary.

Nevertheless, "the question is not free from difficulty". (Fourth Circuit Opinion, Appendix, p. A-6) The conflicting opinions of the federal courts of appeal and the number of recent cases on this issue evidence such difficulty.[4/] The

---

4/ The most recent reported decision, United States v. Barham, 666 F.2d 521 (11th Cir. 1982), follows the holdings of O'Donnell and Tedesco, supra.

neighboring District of Columbia and Fourth Circuits have reached divergent conclusions, presenting "potential administrative problems, if not anomalous results, where the circumstances of a crime involve the District of Columbia and one or more of the adjoining states." (Chief Judge Winter dissenting opinion, Appendix, p. A-16)

The instant petition reflects the third time that the question of proper venue for prosecutions under 18 U.S.C. § 1503 has been presented to this Court for determination. Your petitioner respectfully submits that the time is now appropriate for the Court to consider and decide this important Constitutional issue.

CONCLUSION

For the reasons set forth above, petitioner respectfully prays that a writ of certiorari issue to review and correct the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

BRUCE C. BEREANO
Attorney for Petitioner
195 Duke of Gloucester St.
Annapolis, Maryland 21401
(301) 267-0410

Appendix

APPENDIX A

OPINION SOUGHT TO BE REVIEWED

UNITED STATES OF AMERICA,
Appellee,

V.

JOHNNY KIBLER,
Appellant.

No. 79-5337

United States Court of Appeals,
Fourth Circuit

January 8, 1982

Appeal from the United States District Court for the District of Maryland, at Baltimore.

Before, WINTER, Chief Judge, and BUTZNER and SPROUSE, Circuit Judges.

BUTZNER, Circuit Judge:

Johnny Kibler appeals his conviction for endeavoring to intimidate a witness in a judicial proceeding in violation of 18 U.S.C. §§ 1503 and 2. Kibler's primary assignment of error challenges the district court's ruling and charge to

the jury that venue lies in the district where the judicial proceeding is pending, even though the accused did not threaten the witness there. We affirm the judgment of the district court.

The facts are undisputed. A friend of Kibler, Kenneth R. Preston, was indicted in the District of Maryland for robbing two banks in Baltimore. Preston discussed with Kibler, who was not involved in the robberies, his concern about Albert Morgan, one of his co-defendants. Morgan had confessed and had agreed to testify for the government at Preston's Baltimore trial.

Following these discussions, Kibler and Preston went to Morgan's Washington, D.C., home. While Preston waited in the car, Kibler approached Morgan and asked if he had been "snitching." Kibler then warned, "well, you know what happens to snitches, snitches get hurt . . . even

in jail . . . they get hurt, even there." Preston soon joined them and questioned Morgan about his cooperation with the government. He then proposed that Morgan sign an affidavit exonerating him. When Morgan agreed, he and Preston left to seek a notary. Their search included a trip into Maryland. Kibler did not accompany them.

Kibler was indicted in the District of Maryland on the charge that he threatened Morgan in an endeavor to influence him to testify falsely in the criminal cases pending against Preston in the United States District Court for the District of Maryland. Kibler moved to dismiss the indictment for improper venue because the threats against Morgan were made in the District of Columbia, not in Maryland. The court denied the motion, ruling that the government need not prove that Kibler acted in Maryland.

It held that venue was proper because the prosecution against Preston, which Kibler sought to impede, was pending in Maryland.

I

The United States Constitution guarantees a defendant a trial "in the State where the said Crimes shall have been committed," U.S. Const. art. III, by a "jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Federal Rule of Criminal Procedure 18 implements this right: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed." Venue of a federal prosecution depends on the situs of the crime, but neither the Constitution nor the rule provides criteria for deciding where a

crime has been committed. This must be ascertained by reference to the statute proscribing the criminal act. Johnston v. United States,351 U.S. 215, 220 (1956). If Congress has not provided explicit guidance, the situs of the crime "must be determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Anderson, 328 U.S. 699, 703 (1946). The accused, however, need not be present in the district where the crime was committed. Travis v. United States, 364 U.S. 631, 634 (1961).

The application of these principles to the issue of proper venue for prosecutions charging violations of 18 U.S.C. § 1503 has produced divergent results. Some courts have viewed the offense of intimidating a witness as occurring in the district where the witness was to testify. See, e.g., United States v.

Tedesco, 635 F.2d 902, 904-06 (1st Cir. 1980); United States v. O'Donnell, 510 F.2d 1190, 1192-95 (6th Cir. 1975). Other courts have held that venue is proper only in the district where the threatening actions occurred. See, e.g., United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971); United States v. Brothman, 191 F.2d 70, 72 (2d Cir. 1951). As these opinions illustrate, the question is not free from difficulty. Although a logical argument can be presented to place the situs of the crime only in the district where the accused threatened a witness, both the text of the statute and its legislative history persuade us that venue is proper in the district where the obstruction of justice would take effect.

In United States v. Tedesco, 635 F.2d 902, 905 (1st Cir. 1980), the court observed that examination of the verbs

defining an offense provides an acceptable method for determining the situs of the crime.[1] Section 1503, among other things, punishes one who "corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness . . . in the discharge of his duty . . . or . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice . . .." We agree with Tedesco that analysis of the verbs defining the offense establishes that the situs of the crime is the place of the judicial proceeding that the accused sought to thwart. The threats, force,

---

1. The authorities fully support this means of statutory interpretation. See, e.g., United States v. Chestnut, 533 F.2d 40, 46-47 (2d Cir. 1976); C. Wright, Law of Federal Courts § 43, p. 181 (3d ed. 1976); Dobie, Venue in Criminal Cases in the United States District Court, 12 Va. L. Rev. 287, 289 (1926).

threatening letters,or communication mentioned in the statute are nouns which merely provide a description of the means employed by the accused to achieve an illegal end.

Both Tedesco, 635 F.2d at 905-06, and United States v. O'Donnell, 510 F.2d 1190, 1192-93 (6th Cir. 1975), examine the legislative history of § 1503. These scholarly opinions find the genesis of § 1503 in the power of a court to punish for contempt "regardless of where the contemptuous acts may have occurred." O'Donnell, 510 F.2d at 1195. We find no occasion to recount in detail this legislative history. It is sufficient to note that it supports the conclusion that venue for a prosecution charging a violation of § 1503 lies in the district where the judicial proceeding that the accused sought to

affect is pending.[2]

III

There is a second reason for upholding venue. Kibler was charged also with aiding and abetting Preston's attempt to influence Morgan's testimony. The evidence is undisputed that after Kibler threated Morgan, Preston took Morgan into Maryland. The purpose of this trip was to find a notary so Morgan could execute a false affidavit exonerating Preston. The court instructed the jury about the charge of aiding and abet-

---

2. Also, for reasons adequately set forth in Tedesco, 635 F.2d at 906, and O'Donnell, 510 F.2d at 1193-95, we decline to adopt the contrary view expressed in United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971), and United States v. Brothman, 191 F.2d 70 (2d Cir. 1951)(venue lies only where threats are made). We have no occasion, however, to decide whether venue might also lie in the district where the threats were made. See 18 U.S.C. § 3237 (a) (offenses begun in one district and completed in another); Tedesco, 635 F.2d at 906 n.5; O'Donnell, 510 F.2d at 1193.

ting, but it did not give any special venue instruction on this theory of the case. Kibler's counsel neither asked for such an instruction nor objected to its omission. We find no plain error in this aspect of the trial. An aider and abettor may be prosecuted in the district in which the principal acted in furtherance of the substantive crime. Hyde v. United States, 225 U.S. 347, 362-67 (1912); United States v. Buckhanon, 505 F.2d 1079, 1083 (8th Cir. 1974).

IV

Kibler's other contentions can be disposed of summarily. He argues that the district court committed reversible error by refusing to question jurors individually concerning their racial prejudices. The court, however, did question the panel as a whole on this subject. The trial judge has broad discretion concerning the extent of the inquiry into potential juror prejudice.

United States v. Johnson, 527 F.2d 1104, 1107 (4th Cir. 1975). He is not required to conduct individual inquiry where race is not a central aspect of the case.

Kibler next contends that the district court erred in admitting evidence concerning an earlier attempt he made to persuade another witness involved in the robbery trials to change her testimony. The evidence was properly admitted under Federal Rule of Evidence 404(b) to prove Kibler's intent. Because its probative value was not outweighed by the danger of unfair prejudice of confusion, it was not excluded by rule 403. Moreover, the judge's limiting instructions reduced the likelihood of any prejudice.

Kibler's last assignment of error concerns the court's refusal to grant his motion for judgment of acquittal. The record disclosed ample evidence establish-

ing all the elements of the crime, and the court properly denied the motion.

AFFIRMED.

WINTER, Chief Judge, dissenting:

In my view, venue for this prosecution for commission of the substantive offense lay solely in the District of Columbia so that it was reversible error to try defendant, over his objection, in the District of Maryland. I do not think that the conviction can be upheld on the theory that defendant was also prosecuted as an aider and abettor because the case was submitted to the jury on both theories, and it returned a general verdict, not indicating on what theory it found defendant guilty.

I respectfully dissent.

I.

The indictment in this case charged

that defendant "did by threat and force endeavor to influence, intimidate and impede a witness . . . in the discharge of his duty as such witness by attempting to cause [the witness] to testify falsely and by attempting to prevent [the witness] from testifying", all with respect to two criminal cases pending in the District of Maryland. The indictment was based upon certain of the provisions of 18 U.S.C. § 1503, viz. "[w]hoever . . . by threats or force . . . endeavors to influence, intimidate or impede any witness, in any court of the United States . . . shall be fined no more than $5,000 or imprisoned not more than five years, or both," as well as on 18 U.S.C. § 2, the aiding and abetting statute. It is conceded that all of defendant's alleged criminal conduct occurred in the District of Columbia.

As the majority opinion recognizes, the circuits are split on the issue of venue in circumstances such as those present in this case. The majority, following the decision of the First and Sixth Circuits, holds that venue lies in Maryland where the cases in which the witness would testify were pending. I find the authorities which would lead to the opposite conclusion more persuasive, and I would follow them. See United States v. Nadolny, 601 F.2d 940 (7 Cir. 1979); United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971); United States v. Brothman, 191 F.2d 70 (2 Cir. 1951). To me the offense was complete when the accused endeavored to influence the witness, and this occurred in the District of Columbia. The significance of the phrase "in any court of the United States" is simply to define the protected class of witnesses--they are not to be

witnesses in a state court or witnesses before a federal, state or municipal administrative body. Thus I cannot read the limitation as having any bearing on venue when Congress has failed to specify venue. It seems to me that the purpose of § 2 of the Act of March 2, 1831 which was the predecessor of 18 U.S.C. § 1503, see Nye v. United States, 313 U.S. 33, 45-48 (1941), was to remove the courts' power to punish for constructive contempts and to require that such proceedings be conducted by the normal process of indictment, trial and conviction, including normal rules with respect to venue. Thus I cannot conclude that the offended court should be the preferred forum for prosecution of acts occurring elsewhere.

Finally, I think it unfortunate that the rule prescribed for this circuit is contrary to that of the District of

Columbia Circuit which is an enclave without our own circuit. I can visualize potential administrative problems, if not anomalous results, where the circumstances of a crime involve the District of Columbia and one or more of the adjoining states.

II.

I agree with so much of the government's argument as urges that the defendant may have been properly convicted as aiding and abetting a violation of 18 U.S.C. § 1503. But the case was argued and submitted to the jury on the theory that defendant was guilty as a principal as well as an aider and abettor. I think this was "plain error"; certainly the district court had been alerted to the venue problem by defendant's pretrial motion to dismiss. On what theory the jury convicted is not

disclosed by its general verdict. Thus I do not think that the conviction can be saved.

I would reverse and grant a new trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. N-79-0280

UNITED STATES OF AMERICA

v.

JOHNNY KIBLER

ORAL RULING ON DEFENDANT'S
MOTION TO DISMISS THE
INDICTMENT FOR WANT OF PROPER VENUE

(September 24, 1979)

EDWARD S. NORTHROP, Chief Judge:

All right. I'm going to rule on it and reserve the right to edit it and add any cases or any facts, if necessary.

The matters presently before the Court are defendant Kibler's motion to dismiss or transfer the indictment for lack of venue and his motion for a bill of particulars. Because the Court's disposition of the former motion will affect its resolution of the latter, the

motion to dismiss the indictment shall be considered first.

The indictment under which Kibler is charged alleges that "On or about May 24, 1979, in the State and District of Maryland, Johnny Kibler did by threat and force endeavor to influence, intimidate, and impede a witness, Albert W. Morgan, in the cases of United States v. Kenneth R. Preston, et al. and United States v. Kenneth R. Preston, et al., then pending in the United States District Court for the District of Maryland, Criminal Nos. N-79-0121 and N-79-0211, respectively, in the discharge of his duty as such witness by attempting to cause the said Albert W. Morgan to testify falsely and by attempting to prevent said Albert W. Morgan from testifying." These acts are alleged to constitute violations of 18 U.S.C. §1503. Kibler is also charged as an aider and

abettor under 18 U.S.C. §2.

Although the indictment charges that the acts complained of occurred in the State and District of Maryland, Kibler contends that testimony of the Government's own witnesses cannot establish that Kibler ever entered the State of Maryland. The Government does not controvert this assertion. Kibler therefore contends, relying upon Federal Rules of Criminal Procedure 18, Article 3, §2, clause 3 of the Constitution, and the Sixth Amendment, that the indictment must be dismissed for lack of venue.

For the purposes of this motion, the Court will assume that Kibler committed all of the alleged acts in the District of Columbia and never entered the State of Maryland. Even when this assumption is made, however, it is clear that Kibler's motion to dismiss the indictment must be denied. For as the United

States Court of Appeals for the Sixth Circuit stated, on identical facts: The statute under which the defendant was charged is unique in that the crime proscribed is "constructive" contempt of court. See United States v. Essex, 407 F.2d 214 (6th Cir. 1969). The evident purpose of the statute is to protect the administration of justice by the courts or other judicial agencies. To this end, it is made a crime for any person corruptly or by the means prescribed in the statute to obstruct or impede or to endeavor to obstruct or impede the "due administration of justice." Viewed in this light, we are persuaded that the crime may be considered to have been committed under the statute in the district where the administration of justice was intended to be obstructed or impeded. United States v. O'Donnell, 510 F.2d 1190, 1193 (6th

Cir. 1975); Accord United States v. Elliot, 446 F.Supp. 209 (W.D.Va. 1978). Because defendant Kibler is alleged to have endeavored to obstruct the administration of justice in this district, he may clearly be tried in this district for that offense.

Although United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971) holds to the contrary, the Court believes that the reasoning in Swann ignores the legislative history and purpose of §1503. Because the Court agrees with the reasoning of O'Donnell and Elliot, supra, defendant's motion to dimiss the indictment is denied; and you will draw an order denying it.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. N-79-0280

UNITED STATES OF AMERICA

v.

JOHNNY KIBLER

ORDER

(Entered September 24, 1979)

Upon motions of the defense to dismiss the indictment and for a bill of particulars and the responses submitted by the Government, and after hearing argument in open court regarding the same, it is

ORDERED, this 24th day of September, 1979, that the motions to dismiss indict-

ment for the motion for a bill of particulars be, and they hereby are, DENIED.

/s/ Edward S. Northrop
Edward S. Northrop
Chief Judge
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

JOHNNY KIBLER,
Appellant.

No. 79-5337

January 8, 1982

NOTICE OF JUDGMENT

Judgment was entered in Case No. 79-5337 this date.

The Court's opinion is enclosed.

WILLIAM K. SLATE, II
CLERK

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. N-79-0280

INDICTMENT

(Entered June 19, 1979)

UNITED STATES OF AMERICA,

v.

JOHNNY KIBLER

Criminal No. _____

(Influencing or injuring officer, juror or witness, 18 U.S.C. §1503; Aiding and Abetting, 18 U.S.C. §2)

The Grand Jury for the District of Maryland charges:

On or about May 24, 1979, in the State and District of Maryland,

JOHNNY KIBLER

did by threat and force endeavor to influence, intimidate and impede a witness, Albert W. Morgan, in the cases of

United States v. Kenneth R. Preston, et al and United States v. Kenneth R. Preston, et al, then pending in the United States District Court for the District of Maryland, Criminal Nos. N-79-0121 and N-79-0211, respectively, in the discharge of his duty as such witness by attempting to cause the said Albert W. Morgan to testify falsely and by attempting to prevent the said Albert W. Morgan from testifying.

/s/ Russell T. Baker, Jr.
Russell T. Baker, Jr.
United States Attorney

A TRUE BILL:

_____
Foreman

18 U.S.C. §§1503 and 2

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. N-79-0280

UNITED STATES OF AMERICA,

v.

JOHNNY KIBLER

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AND POINTS AND AUTHORITIES

(Filed September 19, 1979)

Comes now the defendant, Johnny Kibler, by and through his attorney, Bruce C. Bereano, and moves this Honorable Court pursuant to Rules 18 and 21 of the Federal Rules of Criminal Procedure to dismiss the indictment against him for want of proper venue or to transfer the same to the place wherein venue lies for the prosecution and trial. In support of this motion, the defendant states as follows:

1. The defendant is indicted for

violation of 18 U.S.C. §§ 1503 and 2 in that it is alleged that on or about May 24, 1979, in the State and District of Maryland he "did by threat and force endeavor to influence, intimidate and impede a witness, Albert W. Morgan, in the cases of United States v. Kenneth R. Preston, et al and United States v. Kenneth R. Preston, et al, then pending in the United States District Court for the District of Maryland, Criminal Nos. N-79-0121 and N-79-0211, respectively, in the discharge of his duty as such witness by attempting to cause the said Albert W. Morgan to testify falsely and by attempting to prevent the said Albert W. Morgan from testifying."

2. The Court is without proper venue because the offense, if any is cognizable, as it pertains to the instant defendant, only occurred outside of the District of Maryland, that is in

Washington, the District of Columbia. None of the acts complained of or alleged by the Government that the defendant either committed or aided and abetted in the commission of occurred in the State and District of Maryland.

3. Pursuant to Rule 18, Federal Rules of Criminal Procedure, the prosecution of trial "shall be had in a district in which the offense was committed." This is a constitutional right of the defendant as protected by the provisions of the United States Constitution, Article 3, § 2, clause 3, and the Sixth Amendment, that "Trial shall be held in the state where the said Crimes shall have been committed."

4. The sworn testimony of a government witness, Kenneth R. Preston, who testified in the trial of United States v. Isaac Alphonso Pendergast, Criminal No. N-79-0211, and who has pled guilty

to an information filed against him charging him with the same offense as against the defendant Kibler, is that the defendant Kibler did not leave Washington, the District of Columbia, on the date in question to accompany Preston and Morgan in Maryland, nor did anyone else. In addition, the government's witness, Albert W. Morgan, does not know whether or not the defendant Kibler left Washington, the District of Columbia, and came into Maryland on the date in question.

5. The Government has the burden of proof to establish beyond a reasonable doubt the jurisdiction and venue for the prosecution and trial of the instant case against the defendant in the State and District of Maryland. By testimony of its own witnesses and from its own information obtained in the course of investigation of the instant

case, the Government is unable to satisfy such a burden; and

6. That for such other and further reasons as may be stated at a hearing on this matter.

WHEREFORE, the defendant Johnny Kibler prays this Honorable Court:

1. To dismiss the indictment against him; or

2. To transfer the prosecution and trial to the place of proper venue;

3. And for such other and further relief as may be just and proper.

Respectfully submitted,

/s/Bruce C. Bereano
Bruce C. Bereano
195 Duke of Gloucester Street
Annapolis, Maryland 21401
269-5330

Attorney for Defendant

POINTS AND AUTHORITIES

Federal Rules of Criminal Procedure, Rules 18 and 21.
United States Constitution Article III, Section 2, clause 3.
Sixth Amendment.

United States v. Swann, 441 F.2d 1053 (D.C. Cir.)
United States v. Bachert, 449 F. Supp. 508 (E.D.Pa. 1978)

/s/ Bruce C. Bereano
Bruce C. Bereano

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. N-79-0280

UNITED STATES OF AMERICA

v.

JOHNNY KIBLER

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT

(Filed September 20, 1979)

The United States by undersigned counsel hereby states in response and in opposition to defendant's motion to dismiss indictment as follows:

Defendant contends that this Court is without proper venue to try this obstruction of justice case, because the events which gave rise to the indictment occurred outside the District of Maryland. However, as the case which the defendant sought to obstruct was then pending in this Court, this Court has venue.

On May 24, 1979, the defendant and Kenneth Preston accosted Albert W. Morgan at his home in the District of Columbia and sought to persuade him not to testify in the bank robbery cases in this Court in which Preston was a defendant (Criminal Nos. 79-0121, 79-0211). Preston and Morgan drove into Maryland in the course of the evening. While Morgan thought he saw Kibler's car in Maryland, he is not sure, and Preston contends Kibler did not follow them to Maryland.

The Court whose due administration is impeded has venue to hear the resulting obstruction of justice case. United States v. O'Donnell, 510 F.2d 1190 (6th Cir.), cert. denied, 421 U.S. 1001 (1975). The O'Donnell case is exactly on point. In that case arrangements were made in Texas to kill a witness who was to testify in a pending case in Tennessee. The Court stated that the crux of the

obstruction statute is "constructive" contempt of court, and stated:

> Viewed in this light, we are persuaded that the crime may be considered to have been committed under the statute in the district where the administration of justice was intended to be obstructed or impeded.

510 F.2d at 1193. Even if venue might also lie in Texas,

> such fact would not preclude venue in the district where the criminal case was pending--the only district in which the efforts of the defendant to obstruct justice could ultimately have been realized or fulfilled.

The Court reached this conclusion by focusing on the difference between obstruction and other crimes, stating

> It cannot be said that the focus of the statute is exclusively upon any possible means which may be employed. Rather, it is upon the intended effect of any corrupt conduct of whatever description upon the administration of justice

> by the courts. Under Sec. 1503, the effect of corrupt conduct is always intended to occur only at one place; viz., the place or district in which the court sits or in which the proceeding is pending.

This case was followed in another directly analogous case in our circuit, United States v. Elliott, 446 F.Supp. 209 (W.D.Va. 1978).

Furthermore, the defendant is indicted as an aider and abetter under 18 U.S.C. §2. It may be argued that he aided and abetted Kenneth Preston. Preston took Morgan into Maryland during the course of the commission of the crime. The principal's crime sets the venue for the aider and abetter. See, e.g., United States v. Buttorf, 572 F.2d 619 (8th Cir.) cert. denied, 98 S.Ct. 3095 (1978); United States v. Kilpatrick, 458 F.2d 864 (7th Cir. 1972).

Venue is, therefore, proper, and

defendant's motion must be denied.

Respectfully submitted,

Russell T. Baker, Jr.
United States Attorney

By /s/ Jane W. Moscowitz
Jane W. Moscowitz
Assistant U.S.
Attorney
8th Floor,
U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland
21201
Tel: (301)539-2940,
Ext. 285

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. N-79-0280

UNITED STATES OF AMERICA

v.

JOHNNY KIBLER

INSTRUCTIONS TO JURY

(September 25, 1979)

EDWARD S. NORTHROP, Chief Judge:

Now, ladies and gentlemen, as I told you in the beginning of this trial that the evidence comes, of course, from the witnesses who testify in it and the several documents which have been admitted into evidence and those documents you will take with you into the jury room and including the indictment.

You do not take into the jury room, of course, the testimony. The testimony is not transcribed, as I told you before,

and so it's your recollection that governs your final judgment in this case and you are the judges of the facts, nor do you take into the jury room the instructions which I am about to give you. And you are bound to take these instructions and follow them irrespective of the fact of what you would consider the law to be.

There's one thing that I wish to say to you in reference to the law that I have already ruled upon and that is that insofar as this case in concerned the Court has already held and the law is as far as this Court's concerned that Kibler need not be in Maryland to have caused an obstruction of justice. Only the fact that the cases were pending in Maryland which the Government alleges caused obstruction so that's a point of law that you need not bother about. I mean that's something that the fact

that he didn't come into Maryland is not material in reference to what occurred in this matter. All right.

Now that you have heard the evidence and the argument, the time has come to instruct you as to the law governing this case.

* * *

Now, the indictment in this case is a one-count indictment and it reads as follows:

The Grand Jury for the District of Maryland on or about May 24 -- charges that on or about May 24th, 1979, in the State and District of Maryland, Johnny Kibler did by threat and force endeavor to influence, intimidate and impede a witness, Albert W. Morgan, in the cases of United States v. Kenneth R. Preston, et al and United States v. Kenneth R. Preston, et al, then pending in the United States District Court for the

District of Maryland, Criminal Nos. N-79-0121 and N-79-0211, respectively, in the discharge of his duty as such witness by attempting to cause the said Albert W. Morgan to testify falsely and by attempting to prevent the said Albert W. Morgan from testifying.

Now, down at the bottom it has the sections which are violated which I'm going to talk to you about and it's Title 18 U.S.C. §1503 and a "2" is after it and that will indicate to you that those are the sections violated. The 2 means aiding and abetting which I will get to in a moment. Furthermore, I told you that it's not necessary that Morgan present himself in the State of Maryland or be in the State of Maryland in reference to this count of obstructing justice. He may do so from a distance. All that's necessary is that the case is pending in this district which is

stated in the stipulation, that there were two cases pending, which the Government intended to call him as a witness, at least in one of them.

* * *

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 1982, three copies of the foregoing Petition for Writ of Certiorari and Appendix were served upon respondent by depositing the same in the United States Post Office, first-class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C. 20530; and, further, that a copy of the same was mailed on March 9, 1982, first-class postage prepaid, to: Lynne A. Battaglia, Esq., and Jane W. Moscowitz, Esq., Office of the United States Attorney for the District of Maryland, United States Courthouse, Eighth Floor, 101 West Lombard Street, Baltimore, Maryland 21201.

BRUCE C. BEREANO

Opposition

Office - Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS

No. 81-1663

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHNNY KIBLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Nye v. *United States*, 313 U.S. 33 2-3

Strasseheim v. *Daily*, 221 U.S. 280 3

Travis v. *United States*, 364 U.S. 631 3

United States v. *Barham*, 666 F. 2d 521, petition for cert. pending, No. 81-6271 (filed Feb. 24, 1982) 2

United States v. *Brothman*, 191 F. 2d 70 4

United States v. *Cameron*, 460 F. 2d 1394 4

United States v. *Floyd*, 228 F. 2d 913, cert. denied, 351 U.S. 938 4

United States v. *Nadolny*, 601 F. 2d 940 4

United States v. *O'Donnell*, 510 F. 2d 1190, cert. denied, 421 U.S. 1001 ..... 2, 3

United States v. *Swann*, 441 F. 2d 1053 .... 2, 3, 4

United States v. *Tedesco*, 635 F. 2d 902, cert. denied, No. 80-1803 (June 22, 1981) 2, 3, 4

Statutes:

18 U.S.C. (Supp. IV) 1503 ..... 2, 4

18 U.S.C. 1510 4

18 U.S.C. 3237 3

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1663

JOHNNY KIBLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was not properly prosecuted in the District of Maryland for endeavoring to obstruct justice in a criminal proceeding pending in that district, because his culpable acts occurred outside that district.

1. Kenneth R. Preston, a friend of petitioner's, was indicted in the District of Maryland for bank robbery. Preston told petitioner that he was concerned about Albert Morgan, one of his co-defendants, who had agreed to testify for the government at trial. Petitioner and Preston then went to Morgan's home in Washington, D.C., and petitioner told Morgan " 'well, you know what happens to snitches, snitches get hurt * * * even in jail * * * they get hurt, even there.' " Preston then persuaded Morgan to sign an affidavit exonerating him, and Preston and Morgan (but not petitioner) drove to Maryland to seek a notary public (Pet. App. A-2 to A-3).

Petitioner was subsequently indicted, in the United States District Court for the District of Maryland, for endeavoring "by threat and force * * * to influence, intimidate and impede a witness" in the prosecution against Preston, in violation of 18 U.S.C. (Supp. IV) 1503 (Pet. App. A-26 to A-27). He was found guilty by a jury and sentenced to one year's imprisonment (Pet. 13-14). The court of appeals affirmed, rejecting petitioner's argument that venue was proper only in the District of Columbia (Pet. App. A-1 to A-10). Judge Winter, dissenting, agreed with petitioner's contention (*id.* at A-12 to A-17).

2. The court of appeals expressly followed two other circuits in holding that a prosecution for obstruction of justice can be brought in the district of the affected proceeding, and that venue does not lie solely in the district where the culpable acts occurred. See *United States* v. *Tedesco*, 635 F. 2d 902 (1st Cir. 1980), cert. denied, No. 80-1803 (June 22, 1981); *United States* v. *O'Donnell*, 510 F. 2d 1190 (6th Cir.), cert. denied, 421 U.S. 1001 (1975). The Eleventh Circuit has recently reached the same conclusion. *United States* v. *Barham*, 666 F. 2d 521 (1982), petition for cert. pending, No. 81-6271 (filed Feb. 24, 1982). Although the District of Columbia Circuit has taken a different position, holding that venue lies only in the district where the culpable acts occurred (*United States* v. *Swann*, 441 F. 2d 1053 (1971)), this issue no more merits review now than it did when the Court declined to consider *Tedesco* and *O'Donnell*.

As we explained in our Brief in Opposition in *Tedesco*,[1] the offenses described in 18 U.S.C. (Supp. IV) 1503 are akin to contempts of court (80-1803 Br. Opp. 4-5). The statute that became Section 1503 was " 'declaratory of the law concerning contempts of court' " (*Nye* v. *United States*,

---

[1]We have sent a copy of that brief to petitioner.

313 U.S. 33, 46 (1941)), and there is no indication that Congress intended to disturb the traditional ability of the court affected by the obstruction of justice to punish such an interference with its proceedings. See 80-1803 Br. Opp. 4-5 & n.4.[2] The way in which this Court has dealt with analogous issues reinforces the conclusion that petitioner was properly prosecuted in the District of Maryland. See *Travis* v. *United States*, 364 U.S. 631 (1961); *Strassheim* v. *Daily*, 221 U.S. 280 (1911).[3]

As we explained in our Brief in Opposition in *Tedesco*, the conflict with the District of Columbia Circuit's decision in *Swann* does not make this case one that merits review (80-1803 Br. Opp. 6-7). The issue is of limited importance, and in view of the weaknesses of the opinion in *Swann*—it failed to recognize the connection between the offenses described in Section 1503 and contempts of court (see *United States* v. *O'Donnell, supra*, 510 F. 2d at 1193-1194), and it relied on cases involving offenses in which an intended effect on specific proceedings in another district was not an element (441 F. 2d at 1055)—it is not certain that the District of Columbia Circuit would adhere to that decision. In fact, since the government would be unlikely to bring a prosecution in the District of Columbia in a case

---

[2]As we explained in our Brief in Opposition in *Tedesco*, we believe that such offenses may also be tried in the jurisdiction in which the culpable acts occurred. See 80-1803 Br. Opp. 4 n.3; 18 U.S.C. 3237.

[3]In *Travis*, the Court held that a trial for filing a false affidavit in a matter within the jurisdiction of a federal agency could be held in Washington, D.C., where the affidavit was filed, even though the affidavit was executed and mailed in Colorado and the defendant never left Colorado. In *Strassheim*, the Court held that a state could punish a person who had defrauded the state and corrupted an official even if the defendant "never had set foot in the State until after the fraud was complete" (221 U.S. at 285). See 80-1803 Br. Opp. 5-6 & n.5.

in which *Swann* dictates that venue lies elsewhere, there may never be another decision reaching a result contrary to that in petitioner's case. See 80-1803 Br. Opp. 7 & n.6.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1982

---

[4]Petitioner also suggests (Pet. 18, 19-21)—as did the petitioner in *Tedesco*—that the decision below conflicts with *United States* v. *Nadolny*, 601 F. 2d 940 (7th Cir. 1979), and *United States* v. *Brothman*, 191 F. 2d 70 (2d Cir. 1951). But *Nadolny* dealt with a violation of 18 U.S.C. 1510, which prohibits the obstruction of a criminal investigation, and therefore can be violated even if no court proceeding has begun (see, *e.g.*, *United States* v. *Cameron*, 460 F. 2d 1394, 1400-1401 (5th Cir. 1972)); moreover, criminal investigations may occur in several districts at the same time. Consequently, the offenses described by Section 1510 are not akin to contempts of court in the same fashion as those described by Section 1503. Other Seventh Circuit decisions indicate that that court would agree with the court below and permit the government to prosecute a violation of Section 1503 in the jurisdiction of the proceeding it affects. See *United States* v. *Floyd*, 228 F. 2d 913, 918 (7th Cir.), cert. denied, 351 U.S. 938 (1956); 80-1803 Br. Opp. 7.

In *Brothman*, the government apparently conceded that venue was improper; the only contested issue was whether the defendant had waived his venue objection by failing to raise it prior to trial. 191 F. 2d at 72; see 80-1803 Br. Opp. 7.

DOJ-1982-04